TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction to Grant Certiorari	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Proceedings Below	6
Reasons for Granting the Writ	7
Argument	8
Conclusion	19

Cases Cited

A. S. Rampell Inc. v. Hyster Co., 3 N. Y. 2d 369, 165 N.Y.S. 2d 475, N. E. 2d 371 (1957) 11, 12

Bernhardt v. Polygraphic Co., 350 U. S. 198 (1956) 10, 17

Bucki & Son v. McKinnon, 37 Fla. 391, 20 So. 540 (1896) 9

Clay v. Sun Ins. Office, 363 U. S. 207 (1960) 16

Cohen v. Beneficial Ind. L. Ins. Corp., 337 U. S. 541 (1949) 15

Consolidated Fisheries Co. v. Fairbanks, Morse & Co., 193 F. 2d 957 (3 Cir. 1952) 9

Emich Motors Corp. v. GMC, 229 F. 2d 714 (7 Cir. 1956) 18

Erie R.R. v. Tompkins, 304 U. S. 64 (1938) 10, 15

PAGE

First Natl. Bank v. United Air Lines, Inc., 342 U. S. 396 (1952) 10, 14, 15

Foman v. Davis, 371 U. S. 178 (1962) 18

Gibson v. Archer Productions, Inc., 281 App. Div. 661 117 N.Y.S. 2d 438 (1st Dept. 1952) 9

Gillespie v. U. S. Steel Corp., 379 U. S. 148 (1964) .. 18

Griffin v. McCoach, 313 U. S. 498 (1941) 10

Harmon v. Alfred Peats Co., 243 N. Y. 473, 154 N. E. 314 (1926) 9

Hughes v. Fetter, 341 U. S. 609 (1951) 14

Hurd v. Hodge, 334 U. S. 24 (1948) 15

Jannenga v. Nationwide Life Ins. Co., 288 F. 2d 169 (App. D. C. 1962) 13

Klaxon v. Stentor Elec. Mfg. Co., 313 U. S. 487 (1941) 7, 10, 13

Lamar v. Micou, 114 U. S. 218 (1885) 13

Lee v. St. Joe Paper Co., 197 F. Supp. 227 (S.D.N.Y. (1961); 371 F. 2d 797 (2 Cir. 1967) 1, 8

Lindeman v. Textron, Inc., 229 F. 2d 273 (2 Cir. 1956) 11

Miller v. Greene, 104 So. 2d 457 (Fla. 1958) 9

Minichiello v. Royal Business Funds Corp., 47 Misc. 2d 310, 262 N.Y.S. 2d 708 (Sup. N. Y. 1965), *aff'd* 25 A. D. 2d 502, 266 N.Y.S. 2d 570 (1st Dept. 1966), *leave to appeal granted*, 25 A. D. 2d 957, *reversed*, 18 N. Y. 2d 521, 277 N.Y.S. 2d 268, 223 N. E. 2d 793 (1966) 7, 8, 9, 11, 13, 14, 15, 16, 17, 18

O'Connell v. Listowel Urban Distr. Council [1957], 23 Ir. Jur. 43 9

PAGE

Palmer v. Reconstruction Finance Corp., 164 F. 2d 466 (2 Cir. 1947) 12

Parkway Baking Co. v. Freihofer Baking Co., 255 F. 2d 641 (3 Cir. 1958) 13

Pecheur Lozenge Co. v. Natl. Candy Co., 315 U. S. 666 (1942) 13

Perrin v. Perlstein, 314 F. 2d 863 (2 Cir. 1963) 12

Rogers v. White Metal Rolling & Stamping Corp., 249 F. 2d 262 (2 Cir. 1957) 18

Rubin v. Irving Trust Co., 305 N. Y. 288, 113 N. E. 2d 424 (1953) 12

Schultz v. Tecumseh Products, 310 F. 2d 426 (6 Cir. 1962) 13

Sutton v. Leib, 342 U. S. 402 (1952) 10

United States v. Latrobe Constr. Co., 246 F. 2d 357 (8 Cir. 1957) 13

United States v. Raines, 362 U. S. 17 (1960) 12

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538 (1941) 7

STATUTES

U. S. Constitution:

Art. I, § 10 Clause 1 ..... 3, 16

Art. VI, § 2 15

Amendment XIV, § 1, Clause 2 3

PAGE

United States:

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1404 (a) 2

Rules of Decision Act, 1 Stats. 92, Sept. 24, 1789, § 34, 28 U.S.C. § 1652 ..... 3, 15

States:

N. Y. General Obligations Law, § 5-701 (10) formerly New York Peronal Property Law, § 31 (10) ..3, 6, 8, 18

N. Y. Civil Practice Law and Rules 5001 6

MISCELLANEOUS

Federal Rules of Civil Procedure 15 (b) 8, 18

Leg. Doc. (1949) No. 65 (G) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

LOUIS O'D. LEE,

Petitioner,

against

ST. JOE PAPER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Louis O'D. Lee, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit filed in the above-entitled cause on January 25, 1967.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, reversing the judgment in favor of petitioner in the amount of $182,840, entered in the United States District Court for the Southern District of New York, is reported at 371 F. 2d 797.

The opinion of Hon. Edward C. McLean, U.S.D.J., granting in part petitioner's post-trial motion to add pre-trial interest is unreported. It is printed at pages 428-434a.*

* References preceded by "R" are to the Record, references followed by suffix "a" or "b" are to the printed appendices of respondent and petitioner, respectively, in the Court below.

The opinion of Hon. Edmund L. Palmieri, U.S.D.J., denying respondent's motion for summary judgment is unreported (R1916-21).

The opinion of Hon. Charles M. Metzner, U.S.D.J., granting petitioner's motion to strike the defense of statute of frauds is reported at 197 F. Supp. 229 (S.D.N.Y. 1961).

The opinion of Hon. Frederick Van P. Bryan, U.S.D.J., denying respondent's motion to transfer the venue pursuant to 28 U.S.C. § 1404(a) is unreported (R1230-33).

Jurisdiction to Grant Certiorari

The decision of the Court of Appeals was entered January 25, 1967, and a petition for rehearing was denied on March 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where, as a result of a change in the substantive law of the forum State, the choice of law becomes material and, perhaps dispositive, for the first time after argument in the federal Court of Appeals, does the proper administration of justice require the Court of Appeals to hear argument on and decide the question of which law properly governs?

2. In a diversity action, is a federal court required to determine the constitutionality of the application, to the parties before it, of a state rule of decision, when the question is both substantial and timely?

3. Where a recent change in the substantive law of the forum State abolished the plaintiff's cause of action, should the Court of Appeals have permitted the plaintiff to amend his complaint so as to allege a basis for recovery not affected by the change in forum law?

Constitutional and Statutory Provisions Involved

United States Constitution:

Article I, Section 10, Clause 1:

> "No State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts . . ."

Amendment XIV, Section 1, Clause 2:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

Statutes:

Rules of Decision Act, 1 Stats. 92, Sep. 24, 1789, § 34; 28 U.S.C. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

New York Personal Property Law § 31 (10), L. 1949, c. 203, eff. Sep. 1, 1949; repealed and recodified *in haec verba* as General Obligations Law § 5-701(10), L. 1963, c. 576, eff. Sep. 27, 1964; as amended by L. 1964, ch. 561, enacted April 16, 1964, eff. Sep. 27, 1964. To avoid needless repetition, the statute is printed below as it now stands. Matter in italics was added by L. 1964, ch. 561, eff. Sep. 27, 1964.

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged

therewith, or by his lawful agent, if such agreement, promise or undertaking;

"10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. *'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.* This provision *shall apply to a contract implied in fact or in law to pay reasonable compensation but* shall not apply to a contract to pay compensation to an auctioneer, an attorney at law or a duly licensed real estate broker or real estate salesman."

Statement of the Case

The facts are set forth in the opinion of the Court of Appeals, 371 F. 2d 797-99 (2 Cir. 1967). In August 1956, petitioner, an industrial and management consultant in the paper and pulp industry (3a), suggested to Edward Ball, chief executive officer of the respondent, a Florida corporation, that respondent might benefit materially from the acquisition of National Board & Paper Mills, Ltd., an Irish paper-making company located in Waterford, Ireland (5-6a; 1-3b; R245-251). Ball said he was interested and instructed petitioner to obtain more technical and financial information (7a; 3b), which petitioner proceeded to do over the next few months by means of trans-atlantic telephone, cable and correspondence with Mr. Williamson, National's Managing Director (Exs. 2-16; 435-466a), keeping Ball abreast of developments (R41-44, 331, 665, 820; Exs. 17-20; 467-471a).

After several changes in plans, not material here, petitioner and Ball departed for Ireland on October 11, 1957 (10-12a), inspecting the mill at Waterford on October 18th (R65-70); meeting with National's directors in County Galway on the 22nd, and on the 30th in Dublin with Dr. J. P. Beddy, Chairman of Industrial Credit Company, the owner with another Irish company of all of National's stock (R74-114). This last meeting resulted in Dr. Beddy's giving respondent a ninety day option, dated November 6, 1957, to purchase all the stock of National (Ex. 38; 494a).

Later in November, 1957, petitioner met with Ball in Florida where they discussed and disagreed on the amount petitioner was to be paid if the purchase was consummated (23-26a; R116-129, 416, 455). From that time on petitioner was *persona non grata* to respondent, was not invited to participate in any further negotiations (R803), and was denied any further information about subsequent developments (505-506a).

During the early part of 1958 Dr. Beddy came to Florida where he and representatives of respondent drew up an agreement which was signed in Dublin on May 8, 1958 (Ex. 47; 507a). This agreement, as amended, provided for the respondent's acquisition of all of the outstanding stock (other than qualifying shares) and capital debt of National for $2,708,196. Although framed in the terms of an option (expiring August 8, 1963 and later extended to August 8, 1966), it was in all essential respects an installment purchase contract. The respondent was required to pay the owners £100,000 ($280,000) annually, the amount so paid to be applied against the purchase price in the event the option was exercised, otherwise to be forfeited. Complete control and management of National's affairs was turned over to respondent from the outset and has been exercised by it ever since under the direction of Ball, who became Chairman of the Board. At the time of the trial respondent had paid an aggregate of approximately $2,240,000 to

the stockholders in annual installments (all of which would be forfeited if the option were not exercised) and *in addition* had advanced to National, by way of direct and guaranteed loans, funds aggregating approximately $4,500,000 making its total investment $6,740,000 (310-311a).

Proceedings Below

The present action, seeking to recover the reasonable value of petitioner's services in the amount of $175,000, was commenced in Supreme Court, New York County, on December 2, 1960, and was duly removed to the District Court, Southern District of New York, on the grounds of diversity, the petitioner being a citizen of New York and the respondent being a Florida corporation. The action was tried in November 1965, and on the 19th of that month a jury returned a verdict in favor of petitioner in the amount of $140,000, to which the trial judge added $42,840 pre-judgment interest pursuant to New York Civil Practice Law & Rules 5001. Judgment in favor of petitioner was entered on January 6, 1966, in the amount of $182,840. Both parties duly appealed to the United States Court of Appeals, respondent from the judgment and from the denial of several post-trial motions; and petitioner because the trial judge had computed pre-judgment interest improperly.

In the Court of Appeals respondent moved on two occasions to stay further proceedings in that Court pending the outcome of a litigation in the state courts which respondent maintained would dispose of the present action. The state litigation involved the question of whether the 1964 amendment to subdivision 10 of General Obligations Law § 5-701, by "clarifying" prior law, barred an action by a finder or business broker, respondent maintaining that it did and that it would preclude the maintenance of the present action. On June 29, 1965, the Special Term had

held that the 1964 amendment was not merely a clarification of prior law, and that the statute of frauds as it stood prior to the amendment did not apply to an action in *quantum meruit*. *Minichiello* v. *Royal Business Funds Corp.*, 47 Misc. 2d 310, 262 N.Y.S. 2d 708 (Sup. N. Y. 1965). On February 3, 1966, the Appellate Division affirmed, 25 A. D. 2d 502, 266 N.Y.S. 2d 570, Justice Steuer dissenting; and on May 5, 1966, that Court granted leave to appeal to the Court of Appeals, 25 A. D. 2d 957. The Court below twice denied respondent's motions to stay proceedings, and the appeal herein was argued on October 20, 1966. On December 30, 1966, the New York Court of Appeals unanimously reversed the Appellate Division's decision in *Minichiello*, 18 N. Y. 2d 521, 277 N.Y.S. 2d 268, 223 N. E. 2d 793, and on January 25, 1967, the Court below unanimously reversed the judgment of the District Court herein, because it deemed itself bound by *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941), to follow *Minichiello*.

The petitioner herein duly asked the Court below to grant rehearing, challenging the constitutionality of the application of *Minichiello* to this petitioner; urging that petitioner be allowed to show that the state courts would have applied foreign law to the transaction herein; and, if overruled, requesting leave to amend his complaint to assert claims not barred by the New York Statute of Frauds. Rehearing was denied without opinion by the United States Court of Appeals on March 3, 1967. That Court has twice stayed its mandate to the District Court so as to enable the petitioner herein to ask this Court for certiorari.

Reasons for Granting the Writ

1. The decision of the Court below is in direct conflict with this Court's decision in *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), and like cases, because the Court of Appeals applied the internal law of New York without

determining whether the New York courts would have done so, or would have applied foreign law.

2. The proper administration of justice requires the lower federal courts, and particularly the courts of appeals, to decide seasonable and substantial constitutional challenges to state rules of decision as they are applied to the parties in a diversity action, so that on certiorari this Court will have the benefit of the lower court's opinion and reasoning.

3. The proper application of Rule 15(b) of the Federal Rules of Civil Procedure requires that after a reversal of a judgment because of an intervening change in the governing law, a party be entitled to amend his pleadings to assert a claim or defense which survives the change in the law.

ARGUMENT

I

The Court below improperly applied the internal law of New York without determining what law the New York courts would have applied.

The Court below reversed the judgment in favor of the petitioner solely on the authority of *Minichiello* v. *Royal Business Funds Corp.*, 18 N. Y. 2d 521, 277 N.Y.S. 2d 268, 223 N. E. 2d 793 (1966), decided after the argument of the appeal below. The reasoning of the Court below was that "in *Minichiello* the New York Court of Appeals was faced with a similar situation to the one we are faced with here," 371 F. 2d 797, 799, and it therefore applied to the present case the New York Statute of Frauds, General Obligations Law, § 5-701(10), as it had been construed in *Minichiello*.

Until the New York Court of Appeals had ruled in *Minichiello*, the choice of law had been immaterial to the outcome of the instant litigation. Under the laws and decisions of the three jurisdictions having contact with the transactions in suit—Ireland, Florida and New York—the statute of frauds would not have barred an action in *quantum meruit* for services rendered by a business broker or finder. *Gibson* v. *Archer Productions, Inc.*, 281 App. Div. 661, 117 N.Y.S. 2d 438 (1st Dept. 1952), following *Harmon* v. *Alfred Peats Co.*, 243 N. Y. 473, 154 N. E. 314 (1926); *Bucki & Son* v. *McKinnon*, 37 Fla. 391, 20 So. 540, 541 (1896); *Miller* v. *Greene*, 104 So. 2d 457, 462 (Fla. 1958); *O'Connell* v. *Listowel Urban Distr. Council*, [1957] 23 Ir. Jur. 43. This being so, the choice of the governing law as to the statute of frauds has never been fully briefed or argued in either of the courts below.*

The *Minichiello* decision changed all this. For the first time there was a divergence between the laws of the three potentially governing jurisdictions, and this divergence made the choice of law both material and critical. If the defense of statute of frauds were to be determined under the law of the forum, respondent would perforce prevail. If the defense were measured by the law of Ireland or Florida, the judgment of the District Court on that point must be affirmed.

On the petition for rehearing in the Court below, which was petitioner's first opportunity to raise the question

---

* Where the choice of law is immaterial to the outcome of an action, the federal courts are not required to make gratuitous decisions on conflicts of laws questions. Thus the Third Circuit said in Consolidated Fisheries Co. *v.* Fairbanks, Morse & Co., 193 F. 2d 957, 958 (3 Cir. 1952):

> "Since this decision rests on elementary principles of contract interpretation and the result would in no way be affected by the choice of law, it is unnecessary for us to decide which law a Pennsylvania court would apply."

after it had become material, petitioner asked the Court to allow argument that the New York courts would not have applied the New York statute to the transaction in suit. The Court of Appeals denied rehearing without opinion.

a. The Court below failed to decide what law the New York courts would have applied to the facts of the present case.

This Court has held that the rule of *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1938), requires the federal courts in diversity cases to apply not merely the internal law of the forum state, but also its conflicts of law rules. *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941). In *Klaxon* and in *Griffin* v. *McCoach*, 313 U. S. 498 (1941), this Court reversed judgments of lower federal courts which had applied foreign substantive law without first determining whether the courts of the forum State would have done so. In *First National Bank* v. *United Air Lines*, 342 U. S. 396 (1952), this Court reversed the judgment of the Seventh Circuit for applying a statute of the forum State, which this Court held to deny full faith and credit to the internal law of a sister State by which the rights of the parties were properly to be governed. *Cf.*, *Sutton* v. *Leib*, 342 U. S. 402 (1952). Thus, in refusing to consider what internal law the New York courts would have applied to the transaction in suit, the Court below violated the command of the *Klaxon, Griffin and First National Bank* cases, *supra*. The correct choice of law is not, of course, for this Court to make. That choice should be made by the Court of Appeals on remand, *cf.*, *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 205, 209, 212 (1956), and should have been made by that Court on the petition for rehearing.

b. The New York courts would not have applied the forum statute of frauds on the facts of the present case.

The Court below erred in characterizing *Minichiello* as a "similar situation to the one we are faced with here." In *Minichiello* there had been no contact with any jurisdiction other than New York. All of the parties were New York citizens or corporations, and all the incidents of the various transactions there took place in New York. Here, on the other hand, the New York contacts were insignificant. The only New York contacts, apart from petitioner's being a New York citizen, were that petitioner sent and received correspondence and telephone calls from that State, and he also had a few conversations with Mr. Ball while the latter was in New York on other business. Under oath Mr. Ball characterized these conversations as "of casual and passing nature" (R. 1220). Petitioner also had some contacts with respondent in Florida. However, the greater part of petitioner's services to respondent, by far, was physically performed by petitioner in the Republic of Ireland, when petitioner accompanied Mr. Ball there, performed introductions to the directors of National, and attended various conferences and inspection tours in that country.

The New York Statute of Frauds does not apply to every contract within its coverage merely because action on such contract is brought in that State. In *A. S. Rampell, Inc.* v. *Hyster Co.*, 3 N. Y. 2d 369, 382, 165 N.Y.S. 2d 475, 486-87, 144 N. E. 2d 371, 380-81 (1957), the New York Court of Appeals held that the statute of frauds was not a defense to an action arising out of the oral modification of a written contract governed by the law of Oregon, where that State permitted such modifications. Similarly, in *Lindeman* v. *Textron, Inc.*, 229 F. 2d 273, 276 (2 Cir. 1956), the Court of Appeals held that subdivision 10 of the statute of frauds would not apply to an action brought in New York where the crucial events had occurred in jurisdictions other than

New York.* *Cf., Perrin* v. *Perlstein,* 314 F. 2d 863, 866-67 (2 Cir. 1963). Accordingly, the Court below should have heard reargument to determine whether or not the New York courts would have applied the New York statute on the facts of the present case.

c. Petitioner did not waive his right to have the proper law applied, and no prejudice will result if it be applied.

Petitioner has been the victim of bad timing in that *Minichiello* was decided after the present case had been argued in the Court of Appeals. Had *Minichiello* been decided prior to the filing of briefs and argument in the Court below, petitioner would not have been foreclosed from arguing that the judgment of the District Court in his favor must be affirmed under the proper law because a court of appeals "may affirm a judgment upon grounds not urged in the lower court, . . . [although it] may not reverse one upon such a ground." *Palmer* v. *Reconstruction Finance Corp.,* 164 F. 2d 466, 468 (2 Cir. 1947); *cf., United States* v. *Raines,* 362 U. S. 17, 27 nt. 7 (1960). Of course, in the

---

* The decision in the *Rampell* case had been foreshadowed in Rubin *v.* Irving Trust Co., 305 N. Y. 288, 300, 113 N. E. 2d 424, 428 (1953). There the Court held that because of New York's strong public policy against oral modification of wills, it would apply the New York statute to deny enforcement to an oral contract to bequeath property, made by a New York testator in Florida where such contracts were valid. But the Court indicated that its holding would not apply to mere commercial transactions. *Loc. cit.* Judge Desmond's suggestion that the New York statute be applied to any contract sought to be enforced in the State regardless of its validity by the *lex locus contractus,* 305 N. Y. at 307, 113 N. E. 2d at 432, was not adopted by the Court.

The only discernible New York policy in connection with subdivision 10 is the protection of New York businessmen from unfounded claims of brokers and finders. Leg. Doc. (1949) No. 65(G), p. 615. There would seem to be no compelling reason to extend the protection of New York's policy to a Florida corporation if Florida itself has not seen it necessary to provide its citizens with such protection. That the claim herein is well founded is amply attested to both by the verdict and the record.

Court below the petitioner was the appellee, seeking an affirmance of a substantial judgment in his favor. But the timing of *Minichiello* restricted petitioner to seeking the discretionary remedy of a petition for rehearing, which the Court of Appeals refused to grant, without opinion.

Klaxon v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), *supra*, and like cases strongly suggest that a litigant in the federal courts is entitled as of right to have the proper law applied where the determination of that law is material and perhaps dispositive of the action. *Cf.*, *Pecheur Lozenge Co., Inc.* v. *National Candy Co., Inc.*, 315 U. S. 666 (1942). In *Parkway Baking Co., Inc.* v. *Freihofer Baking Co., Inc.*, 255 F. 2d 641, 646 (3 Cir. 1958), the Third Circuit construed the *Pecheur* case and *Lamar* v. *Micou*, 114 U. S. 218, 223 (1885), as conferring an absolute right to the proper choice of the governing law:

> "'Neither the failure of National to raise the issue of Illinois law below, nor its lack of compliance with the Pennsylvania Judicial Notice Act can bar our application of Illinois law on this appeal. . . . *And National cannot be considered to have waived its right to have the contract interpreted under the proper law by failing to raise the question in the District Court.* . . . It is clear, therefore, that the law of Illinois governs the interpretation of this contract." (Italics added.)

Accord, United States v. *Latrobe Constr. Co.*, 246 F. 2d 357, 361 (8 Cir. 1957); *Schultz* v. *Tecumseh Products*, 310 F. 2d 426, 433 (6 Cir. 1962).* The holding of the *Parkway Baking* case, *supra*, would seem particularly apt in situations where a state court would be obliged to give full faith and credit

---

* Although some cases appear to hold that the application of a different law in the appellate court is purely discretionary with that court, see *e.g.*, Jannenga *v.* Nationwide Life Ins. Co., 288 F. 2d 169, 172 (App. D. C. 1962) (and cases cited therein), such cases generally involve situations in which applying such new law would require a new trial.

to a sister-state's law, for a federal court can no more deny full faith and credit to the proper law than can a state court. *Compare, First National Bank* v. *United Air Lines,* 342 U. S. 396 (1952), with *Hughes* v. *Fetter,* 341 U. S. 609 (1951).

Since the case had been tried on the theory that the statute of frauds was not a defense to the action, the application of the law of a jurisdiction in which it is not a defense can not alter the result of the trial and will not prejudice the respondent.

In the circumstances, the Court below should not have treated the petition for rehearing as an application for an act of grace, which rehearing normally is, but should have heard reargument on the choice of law as part of its constitutional duty to decide cases and controversies properly before it. Its failure to do so requires that the judgment below be vacated.

II

The Court below improperly deprived petitioner of a hearing on the merits on a substantial and timely challenge to the constitutionality, as applied to petitioner, of the state rule of decision.

Just as the decision of *Minichiello* for the first time raised a choice of law question after the argument in the Court below, so also did that decision for the first time create a question as to the constitutionality of applying to this petitioner the rule enunciated by the New York Court of Appeals.* On the petition for rehearing in the Court below,

* In opposing respondent's motion to extend its time to file briefs in the Court below until after decision in *Minichiello,* counsel for petitioner ventured (affd. R. L. Duff, sworn to May 27, 1966, pp. 5-8) that a reversal by the Court of Appeals in *Minichiello* would violate the Constitution. However, these papers presumably were not before the Court below when it reversed the judgment of the District Court.

petitioner urged the Court to allow rehearing and argument because (pp. 5-6):

> "If the effect of *Minichiello* is in fact to impair the obligations of contracts performed prior to the 1964 amendment, then this Court can not properly regard *Minichiello* as controlling here. The only state law which may be applied by the federal courts in diversity cases under *Erie* v. *Tompkins*, 304 U. S. 64 (1938), is constitutional state law. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 547 (1949). This Court, therefore, has an obligation to make an independent determination as to whether *Minichiello* accords with the Constitution."

By denying the petition for rehearing below, the Court of Appeals foreclosed petitioner from a hearing as of right, since this Court may deny certiorari for reasons unrelated to the merit of a petition.

To say that in a diversity case the federal court may apply only constitutional state laws is to state a truism. It follows not only from the Rules of Decision Act, 28 U.S.C. § 1652, itself, but also from the Supremacy Clause of the Constitution, Art. VI, § 2. As this Court said in *Hurd* v. *Hodge*, 334 U. S. 24, 35-36 (1948) (a non-diversity case):

> "We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States."

Again, in *First National Bank* v. *United Air Lines*, *supra*, 342 U. S. 396 (1952), by reversing the judgment of dismissal entered on authority of an Illinois statute which forbade enforcement of out-of-state wrongful death actions, this Court demonstrated the utter incapacity of a federal court to apply an unconstitutional state statute as the rule of decision in a diversity case.

Since it is also a maxim of constitutional law that no federal court will declare a state statute or judicial rule of decision unconstitutional where there is another avenue to decision, *Clay* v. *Sun Insurance Office*, 363 U. S. 207, 211 (1960), and since the constitutional question herein is not reached until the choice of law issue is decided, we do not *on this petition* ask this Court to declare the New York rule unconstitutional, and do not therefore set forth the grounds why we believe its application to this petitioner would violate the Contracts Clause, Art. I, § 10, and the Due Process Clause of the Fourteenth Amendment.*

However, petitioner respectfully submits that the orderly administration of justice requires that the federal courts should decide even constitutional questions when these are both substantial and timely, and can not be avoided. Since both the conflicts question and the constitutional question herein arose after the argument below, we believe the Court of Appeals was duty bound to grant rehearing. The decision below, as it now appears, is a decision only of a part of a case. The result of the piecemeal decision below is that petitioner's judgment for $182,840 has been reversed on authority of a statute which may well be inapplicable or, if applicable, unconstitutional as applied. More than just losing his judgment, petitioner is faced upon the remand of this case to the District Court with a judgment for costs against him which counsel is informed may exceed $17,000.

The lack of a decision below on the choice of law and the constitutionality of the application of *Minichiello* to

---

* The constitutional argument is set forth in some detail in the petition filed to review the decision in Minichiello *v.* Royal Business Funds Corp. If this Court grants certiorari in that case and either affirms or reverses the judgment of the New York Court of Appeals therein, the constitutional question herein may vanish. Nevertheless, certiorari should be granted herein and the decision below vacated or reversed and the cause remanded for decision of the other questions which the Court of Appeals never reached, including respondent's assignments of error.

this petitioner, means that those questions are before this Court *nisi prius*. This Court, therefore has no guide as to the substantiality of the petitioner's contentions. There is no opinion in the Court below bearing upon the questions involved. To make any kind of case in this Court the petitioner must in effect write a brief on the merits since there is no holding below on which he may comment briefly, and no rationale which he may refute. Such is not properly the office of a petition for certiorari. This petitioner has been spared the laborious documentation of the constitutional argument itself because the *Minichiello* petition has done that, and repetition is unwarranted herein.* But this Court is entitled to have the question considered below. *Cf., Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 209 (1956) (Frankfurter, J., concurring); *id.*, at 212 (Harlan, J., dissenting).

The Court of Appeals' refusal to grant rehearing on the important questions raised on the petition below, therefore, was an abuse of its discretion, and the judgment below should be reversed or vacated and the cause remanded to that Court for decision of the two questions made material for the first time by the New York Court of Appeals' decision in *Minichiello*.

III

The Court below abused its discretion in refusing to grant petitioner's motion for leave to amend the pleadings so as to assert a claim not barred by the New York Statute of Frauds.

Had the Court of Appeals granted rehearing and then determined (1) that as a matter of choice of law the forum statute of frauds applied, and (2) that such application to petitioner did not involve an unconstitutional

---

* Copies of the *Minichiello* petition have been furnished to the attorneys for the respondent herein.

impairment of the obligations of contract, the Court below should have allowed amendment of the petitioner's pleadings in the interests of justice. Rule 15(b) of the Federal Rules of Civil Procedure directs that leave to amend shall be freely given when justice so requires. *Cf., Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 158 (1964); *Foman* v. *Davis*, 371 U. S. 178 (1962). A recent change or clarification of the controlling decisional law is recognized as ample justification for amendment, even after trial and appeal. *Rogers* v. *White Metal Rolling & Stamping Corp.*, 249 F. 2d 262 (2 Cir. 1957); *Emich Motor Corp.* v. *General Motors Corp.*, 229 F. 2d 714 (7 Cir. 1956).

The Record in this case demonstrates the merit of petitioner's claim for compensation for his services in the transaction, quite apart from services rendered as a finder or broker (which are the only services proscribed by subdivision 10 of General Obligations Law § 5-701). The respondent has itself admitted as much in its reply brief in the Court below, where it stated (pp. 6-7):

> "The conclusion is inescapable that, the idea having already been disclosed, *the intention of the parties was that plaintiff was to aid and assist in the transaction, and be compensated for his 'time and expense incurred'.* This is exactly what plaintiff himself testified, and further strong evidence of this was that it had previously been done this way between the parties. *Defendant has never denied that plaintiff was entitled to some compensation for his services,* only that he was entitled to a large portion of the purchase price and a stock participation as an ordinary commercial finder or broker. *The intention of the parties* • • • *was that the compensation was to be determined, as it had previously been done, for the amount of effort and expense involved.* This is why defendant offered to pay the expense of the Irish trip (83a), and why plaintiff said he was 'willing to assume • • • the expense • • • [and] expected this would be taken into

consideration in the final compensation.' * * * Plaintiff knew he would be reimbursed on the basis of their past dealings. *This further evidences that this was no ordinary commercial hiring, but a special sort of relationship* * * *" (Italics added).

Had the Court of Appeals granted rehearing, therefore, and ruled against petitioner on the choice of law and on constitutionality, it should in the interests of justice, have remanded to the District Court with instructions to the District Court to give petitioner leave to amend his complaint in order to assert claims which survived the change of law.

CONCLUSION

The decision of the Court of Appeals, reversing the judgment of the District Court in favor of petitioner, should be vacated or reversed, and the cause remanded to the Court of Appeals with instructions

(a) To determine what law the courts of New York would have applied to the facts of the present case;

(b) To determine whether, if the New York courts would have applied the New York statute of frauds, as construed, to this petitioner, they could have done so constitutionally, and if so

(c) To permit amendment of the complaint to allege a claim which is not affected by the change in law.

Respectfully submitted,

REGINALD LEO DUFF,
Attorney for the Petitioner.

JOYCE DARYL CHAIKIN,
Of Counsel.

INDEX TO APPENDIX

	PAGE
Judgment Below	1a
Opinion Below	2a
Order Denying Rehearing and Staying the Issuance of the Mandate	7a

Judgment Below.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of January one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

LOUIS O'D. LEE,
Plaintiff-Appell[ee],

v.

ST. JOE PAPER COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are reversed and that the action be and it hereby is remanded for entry of judgment for defendant-appellant in accordance with the opinion of this court with costs to the defendant-appellant.

A. DANIEL FUSARO,
Clerk.

Opinion Below.

Before: WATERMAN, HAYS and ANDERSON, *Circuit Judges.*
WATERMAN, *Circuit Judge:*

In this diversity suit governable by the law of the State of New York St. Joe Paper Company appeals from a judgment of the United States District Court for the Southern District of New York entered on a jury verdict of $140,000 in favor of Louis O'D. Lee for the value of his services as a business broker or finder and from an additional award by the court on that verdict of $42,840, pre-judgment interest.[1] Lee, maintaining that he is entitled to a larger interest award, cross-appeals from the interest awarded.

St. Joe Paper Company (St. Joe) is a Florida corporation. It owns timberlands in Florida, has a paperboard manufacturing facility in Port St. Joe, Florida, and several box manufacturing plants located elsewhere in the United States. Lee describes himself as an industrial and management consultant. He maintains an office in New York City from which he conducts various activities including those of a broker and salesman of raw materials and machinery used in the pulp and paper industry. Upon requests of St. Joe's chief executive, Edward Ball, whom he had known for many years, Lee had participated in a number of business transactions with St. Joe prior to the one at issue.

In August 1956 Lee called upon Ball while Ball was in New York City and showed him a magazine article about an Irish company, National Board & Paper Mills, Ltd. (National) which had recently put a box plant into operation at Waterford, Ireland. Lee suggested that St. Joe might be interested in investing in the Irish plant so as to gain a foothold in the overseas market, and he pointed

---

[1] Defendant not only appeals from the judgment of $182,840, but also from the denial of its several motions for a directed verdict, to set aside the verdict, to reduce the verdict as excessive, and for a new trial.

out a number of advantages in production cost, tariff, and tax savings which would accrue from the combined operation. Ball indicated that he was interested and directed Lee to get more information about the Irish operation.

Thereafter Lee conducted an extensive correspondence with Frank Williamson, the Managing Director of National, in order to gather necessary technical and financial information about the Waterford facility. He forwarded this correspondence to Ball who indicated further interest by inviting Williamson to come to the United States to negotiate a probable transaction. To this Williamson suggested that negotiations should be conducted in Ireland. This was agreed to, and in October 1957 Lee and Ball traveled to Ireland and inspected the Waterford plant on October 18, 1957. In the days following this inspection Lee and Ball met various representatives of National to discuss future relationships. A few days after these meetings Lee and Ball went to Dublin and there met with Dr. Beddy, the spokesman for the Industrial Credit Company, Limited (Industrial Credit) and The Irish Assurance Company (Irish Assurance), the two government owned companies which owned the common and preferred stock of National. Lee claims Ball reached Dr. Beddy, who proved to be the man with the authority to negotiate for any contract, through Lee's contacts; Ball claims the introduction came about through information furnished directly to him by a William Bennett, a New York banker. No contract was consummated between Ball and Beddy at that time because Ball needed the approval of the St. Joe Board of Directors before committing his company.

On November 6, 1957, Beddy, acting on behalf of Industrial Credit, sent a letter to Ball in Florida, granting St. Joe a 90-day option to purchase the common and preferred stock of National. This option was never accepted by St. Joe, but extensive negotiations between Dr. Beddy and St. Joe culminated in an elaborate agreement of May

8, 1958 between St. Joe and Industrial Credit. This agreement gave St. Joe a 5-year and 3-month option, later extended for three additional years, to purchase the stock of National for the equivalent of $1,755,373. The consideration for the option was £100,000 per year, such payments to the extent that they exceeded certain debts of National to be credited against the purchase price if the option was exercised. The agreement also provided that St. Joe have immediate and exclusive management control of National.

Lee, who returned from Europe separately from Ball, learned about the November 6th option from Ball. Lee then flew to Florida on November 16th to meet Ball and discuss his compensation for his efforts in the matter. Ball and the other representatives of St. Joe differed substantially from Lee as to the amount to which Lee was entitled. Lee wanted $132,000 in the form of a stock participation in National; Ball offered $10,000 or $20,000 if Lee would remain and help negotiate a final transaction with Industrial Credit. After this Lee and Ball parted company. Lee took no part in the subsequent negotiations with Industrial Credit which led to the May 8th agreement and indeed was unable to find out about that agreement until after he instituted legal proceedings.

St. Joe proceeded to take over the management of National and to make payments to maintain its stock purchase option, but as of the date of the trial herein it had not exercised the option.

Lee commenced this action on December 2, 1960 in New York Supreme Court, New York County. As there had been no written contract between Lee and St. Joe providing for payment to Lee of any specified sum for any services he might render St. Joe the action was brought to recover the value *in quantum meruit* of plaintiff's alleged services as a business broker or finder in allegedly bring-

ing about defendant's opportunity to acquire the Irish corporation's stock. St. Joe removed the case to the court below on the ground of diversity of citizenship. St. Joe then moved for summary judgment on the ground that the New York Statute of Frauds then in effect, New York Personal Property Law Section 31(10), enacted in 1949 (now contained, as amended in 1964, in New York General Obligations Law Section 5-701(10)), barred Lee's recovery in the absence of a written memorandum or agreement between the parties. The motion was denied. The case proceeded to trial, St. Joe moved for a directed verdict on the ground that the statute applied, the trial judge denied the defendant's motion and in so ruling held that the statute did not bar Lee's action here. Although this determination would seem to have been correct at the time it was rendered in January, 1966,[2] a subsequent interpreta-

---

[2] The pertinent section of the 1949 act, Personal Property Law § 31(10) reads as follows:

> Agreements required to be in writing
>
> Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> * * * * *
>
> 10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including the majority of the voting stock interest in a corporation and including the creating of a partnership interest. . . .

Subdivision 10 had been added by the Legislature in 1949 upon the recommendation of the Law Revision Commission, which had stated:

> "Its purpose is to provide that contracts or agreements for the compensation of business brokers must be evidenced by a

(Footnote continued on following page)

tion of the statute by New York's highest court, the New York Court of Appeals, in *Minichiello et al.* v. *Royal Business Funds, et al.*, —— N. Y. 2d ——, January 3, 1967, while the within appeal has been *sub judice*, has made it clear that the statute does indeed bar Lee's action.

In *Minichiello* the New York Court of Appeals was faced with a similar situation to the one we are faced with here. Plaintiff sought recovery *in quantum meruit* for the value of services allegedly rendered to defendants for finding a source of investment through the purchase of all the stock of a corporation. Plaintiff had no written memorandum of his alleged contract. Defendant moved to dismiss the complaint on the ground that the action was barred by the 1949 Statute of Frauds in effect prior to the 1964 amendment. The Court of Appeals concluded "that the 1949 Legislature intended to include finders within the operation of § 31(10) and to preclude any recovery in *quantum meruit*." *Minichiello et al.* v. *Royal Business Funds, et al.*, —— N. Y. 2d —— at ——.

Judgment reversed[3] and entry of judgment for defendant is ordered.

(Footnote continued from preceding page)

memorandum in writing and signed by the party to be charged." 1949 Leg. Doc. No. 65(G); 1949 Report, Recommendations and Studies, pp. 609-651.

Despite this indication of legislative purpose, the section was subsequently construed by lower New York courts to permit recovery, despite the absence of a writing, *in quantum meruit*. See Gibson v. Archer Productions, Inc., 117 N.Y.S. 2d 438, 281 App. Div. 661 (1st Dept 1952); Wells v. Dent, 164 N.Y.S. 2d 646, 4 A. D. 2d 307 (4th Dept. 1957). And, as explained by the Court of Appeals in Minichiello, —— N.Y.S. 2d —— at ——, "The section has also been construed to be inapplicable to business 'finders' as opposed to brokers. See Wells v. Dent, supra; Kuffler v. List, 144 F. Supp. 776 (S.D.N.Y. 1956)." This interpretation has now been reversed by *Minichiello*.

[3] See *Vanderbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941).

Order Denying Rehearing and Staying the Issuance of the Mandate.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of March, one thousand nine hundred and sixty-seven.

Present: Hon. Sterry R. Waterman,
Hon. Paul R. Hays,
Hon. Robert P. Anderson,
Circuit Judges.

A petition for rehearing having been filed herein by counsel for the plaintiff-appellant together with a motion to stay the issuance of the mandate pending a petition for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed pursuant to and subject to the provisions of Rule 28(c) of the rules of this court.

A. Daniel Fusaro
Clerk

SUPREME COURT, U. S.
LIBRARY

137

No. 1364

Office-Supreme Court, U.S.
FILED
JUN 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

LOUIS O'D. LEE,

Petitioner,

v.

ST. JOE PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID W. PECK
48 Wall Street
New York, New York 10005
and
IRVING ROZEN
1501 Broadway
New York, New York 10036
Counsel for Respondent

SULLIVAN & CROMWELL
and
WEISMAN, CELLER, ALLAN,
SPETT & SHEINBERG
Of Counsel

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
REASONS FOR DENYING THE PETITION	3
CONCLUSION	7
APPENDIX A—Opinion of McLean, *D.J.*	A1
APPENDIX B—Opinion of Palmieri, *D.J.*	B1
APPENDIX C—Opinion of Metzner, *D.J.*	C1
APPENDIX D—Opinion of Bryan, *D.J.*	D1

TABLE OF AUTHORITIES

Cases

Lee v. *St. Joe Paper Company*, 371 F.2d 797 (2d Cir. 1967)	1, 6
Lee v. *St. Joe Paper Company*, 197 F. Supp. 229 (S.D.N.Y. 1961)	2, 4
Minichiello v. *Royal Business Funds Corp.*, 18 N.Y.2d 521 (1966), *cert. filed*, No. 1363, O.T. 1966	3, 6

Statutes

28 U.S.C.	
§1254(1)	2
§1404(a)	2, 4
N.Y. Personal Property Law §31(10)	3

IN THE

Supreme Court of the United States

October Term, 1966

No. 1364

LOUIS O'D. LEE,

Petitioner,

v.

ST. JOE PAPER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 371 F.2d 797 (2d Cir. 1967), and printed in Petitioner's Appendix, pp. 2a-6a.

The opinion of Hon. Edward C. McLean, U.S.D.J., granting in part Petitioner's post-trial motion to add pre-judgment interest is unreported (428a-434a*). It is printed as Appendix A herein.

* References preceded by "R" are to the Record, references followed by suffix "a" or "b" are to the printed appendices of Respondent and Petitioner, respectively, in the Court below.

The opinion of Hon. Edmund L. Palmieri, U.S. D.J., denying Respondent's motion for summary judgment, is unreported (R. 1916-21). It is printed as Appendix B herein.

The opinion of Hon. Charles M. Metzner, U.S.D.J., granting Petitioner's motion to strike the affirmative defense of the Statute of Frauds is reported at 197 F. Supp. 229 (S.D.N.Y. 1961). It is printed as Appendix C herein.

The opinion of Hon. Frederick Van P. Bryan, U.S.D.J., denying Respondent's motion for change of venue pursuant to 28 U.S.C. §1404(a), is unreported (R. 1230-33). It is printed as Appendix D herein.

Jurisdiction

The decision of the Court of Appeals was entered January 25, 1967, and a petition for rehearing was denied on March 3, 1967. The petition for the writ of certiorari was filed May 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Petitioner, during approximately six years of litigation, repeatedly contended successfully that the substantive law of New York governed his claim in *quantum meruit* for a broker's or finder's fee, and that such a claim was not barred by the New York Statute of Frauds, enacted in 1949. In 1966, New York's highest

court, in a case the final outcome of which Respondent has consistently maintained would be determinative of this action, for the first time interpreted the provision of the New York Statute of Frauds governing business opportunity brokers (N.Y. Personal Property Law §31(10)), and held that the statute did bar a claim such as Petitioner's (*Minichiello* v. *Royal Business Funds Corp.*, petition for certiorari now pending, No. 1363, Oct. Term 1966). The question presented is

> Did the Court of Appeals abuse its discretion by denying rehearing on Petitioner's claims, asserted for the first time in his motion for rehearing, that
>
> (a) the law of New York should now be held not to apply in this case, or that
>
> (b) Petitioner should be permitted to amend his complaint in order to assert a new claim not governed by the New York Statute of Frauds?

Reasons for Denying the Petition

Petitioner has advanced three grounds in support of his petition, none of which meets the standards enunciated in Rule 19 or elsewhere to justify the grant of certiorari.

I.

This suit was commenced by Petitioner in December 1960 in the New York State courts, and removed to the Southern District of New York on the ground of diversity of citizenship (R. 1164-74). On Respond-

ent's motion to transfer the action under 28 U.S.C. §1404(a), Petitioner successfully resisted the motion on the ground that the facts pleaded by Petitioner showed conclusively that the internal law of New York would govern his rights (see Appendix D to this Brief). In his affidavit in opposition to the motion, Petitioner recited all of the work which he claimed was performed by him in New York, and then stated (at p. 5):

> "My counsel advises me that, contrary to the claim in Mr. Ball's affidavit (p. 5), the law of New York and not the law of Florida will govern my rights against the defendant."

After Respondent, in its answer, had pleaded the affirmative defense of the Statute of Frauds, Petitioner had that defense struck by the District Court (197 F. Supp. 229 (S.D.N.Y. 1961); Appendix C to this Brief).

Prior to trial, the choice-of-law question was again raised in Respondent's motion for summary judgment (R. 1916-21; Appendix B to this Brief), and thereafter the parties proceeded to trial on the basis that New York law governed Petitioner's claim.

After verdict, the choice of law again became material in Petitioner's motion to add pre-judgment interest to the verdict. In his memorandum in support of that motion, Petitioner stated (p. 3):

> "[I]t may be said that substantially all, if not all, of Mr. Lee's functions as a finder were per-

> formed in New York. Since the contract was not only made in New York but was also substantially performed in New York, the New York law should be held to govern plaintiff's right to pre-judgment interest on the verdict."

The Court, in its opinion granting Petitioner's motion in part, held squarely that New York law governed this transaction (428a-434a; Appendix A to this Brief). In the Court of Appeals, Petitioner rested his case on Judge McLean's opinion on the choice-of-law question (Plaintiff's Br., 20-21).

The repeated motions concerning the applicability of the New York Statute of Frauds to Petitioner's claim throughout the lengthy course of this litigation, and Petitioner's consistent reliance on New York law, have been totally ignored in the petition, and it is now stated that "the New York contacts were insignificant" (Petition, p. 11).

Petitioner apparently argues that, having tried his case and lost, he should now be given an opportunity to change his mind as to the relevant facts and applicable law in order to have another opportunity to press his claim, a claim which he should have known was barred at the commencement of this action.

II

Petitioner's second ground in support of this petition is that the Court of Appeals should have considered the constitutionality of the decision by the New York Court of Appeals which was followed in reversing the judgment for Petitioner. The constitutional

question itself is not pressed on this petition and Petitioner concedes that this ground falls if the petition is denied in the *Minichiello* case (No. 1363, Oct. Term 1966). On this point, Petitioner has stated no independent reason for granting the petition.

III

Petitioner's last point, which personifies the ultimate expression of his sporting theory of justice, is that he should now be given an opportunity to amend his complaint in order to assert an undefined claim for work, labor and services performed. In fact, the entire petition is based upon the fallacious assumption that there has been a change in the law of New York, an assertion which is completely refuted in the *Minichiello* case, and therefore Petitioner should be allowed to change the relevant facts of his case.

Admittedly, Petitioner in 1957 was offered a sum of money by Respondent if Petitioner helped in concluding the negotiations, which Petitioner flatly rejected (26a; 293a-94a). Instead, Petitioner commenced this action in *quantum meruit* to recover a broker's fee of $175,000, and throughout this litigation was well aware of Respondent's contention that his claim was barred by the Statute of Frauds.* After more than

* Petitioner notes (Petition, p. 6) that Respondent attempted to defer the argument of this case in the Court of Appeals until after a decision was rendered in the *Minichiello* case, thus rendering hollow Petitioner's claimed suprise with that decision. In addition, it should be noted that the same counsel argued for Petitioner in the Court of Appeals in this case, and for the plaintiff in the New York Court of Appeals in the *Minichiello* case. (*Compare,* 371 F.2d 797, *with* 18 N.Y.2d 521.)

six years of litigation, and after incurring for Respondent expenses and taxable costs far in excess of the sum of money originally offered to Petitioner (Petition, p. 16), Petitioner now claims that the Court of Appeals abused its discretion by refusing to allow him to amend his complaint and start a new action. The denial of Petitioner's motion for leave to amend his complaint, embodied in that Court's denial of rehearing, certainly was no abuse of discretion, and should not be disturbed by this Court.

CONCLUSION

The decision below is clearly correct and is not deserving of review by this Court. The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

June 5, 1967.

Respectfully submitted,

DAVID W. PECK
48 Wall Street
New York, New York 10005
and
IRVING ROZEN
1501 Broadway
New York, New York 10036
Counsel for Respondent

SULLIVAN & CROMWELL
and
WEISMAN, CELLER, ALLAN,
SPETT & SHEINBERG
Of Counsel

APPENDIX A

Opinion of McLean, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MCLEAN, *D.J.*

This is an action in *quantum meruit* to recover a finder's fee. The action was originally brought in the Supreme Court, New York County, and was removed to this court by defendant on the ground of diversity of citizenship. At the conclusion of the trial, the jury found for plaintiff in the sum of $140,000. Plaintiff thereupon moved to add pre-judgment interest to the verdict. Defendant opposes that motion.

Under New York law, a successful plaintiff in an action to recover the reasonable value of services is entitled to pre-judgment interest.

> New York CPLR §5001
> *Spanos* v. *Skouras Theatres Corp.*, 235 F. Supp. 1, 17 (S.D.N.Y. 1964)

Defendant contends, however, that this question is governed by the law of Ireland. Defendant asserts that under Irish law, pre-judgment interest may not be recovered. No competent proof of Irish law has been offered by either party. Whether it is necessary to take such proof depends upon the decision as to which law governs.

Appendix A

In this diversity case, this court applies the New York rule of conflict of laws.

> *Klaxon* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941);
> *St. Clair* v. *Eastern Air Lines, Inc.*, 302 F. 2d 477 (2d Cir. 1962).

In contract actions New York has adopted the "center of gravity" or "grouping of contacts" theory of conflicts.

> *Auten* v. *Auten*, 308 N.Y. 155 (1954).

Interest is a part of damages. No New York case has been found which, since *Auten* v. *Auten*, has squarely held that the grouping of contacts theory controls the selection of the law to be applied in determining whether this element of damage may be recovered in a contract action. At least one New York case, however, has apparently employed this theory, without expressly saying so, in order to select the law which governs the question of pre-judgment interest.

> *Gold Medal Farms Inc.* v. *Rutland County Co-op. Creamery, Inc.*, 9 App. Div. 2d 473, 195 N.Y.S. 2d 179 (3rd Dept. 1960).

Moreover, the Court of Appeals for this circuit has concluded that the New York courts would follow the *Auten* doctrine in this situation.

> *Royce Chemical Co.* v. *Sharples Corp.*, 285 F. 2d 183 (2d Cir. 1960).

Appendix A

This decision is binding upon me and I must therefore proceed on the assumption that it is the law of New York that the choice of the governing law on this point depends upon a proper alignment of the contacts.

In the present case, plaintiff at all times has been and is a resident of New York. Defendant is a Florida corporation with its principal place of business there. The conversations between plaintiff and defendant's representative, Ball, which the jury evidently found gave rise to at least an implied, and perhaps also to an express, agreement by defendant to retain plaintiff to act on its behalf and to compensate him for his services, took place in New York. Much of the relevant correspondence emanated from plaintiff in New York. On the other hand, the property which was the subject of the negotiations was in Ireland. It consisted of a paper mill owned by an Irish corporation, National Board and Paper Mills Ltd. ("National"), virtually all the stock of which was owned by two other Irish corporations, Industrial Credit Company Ltd. ("Industrial") and Irish Assurance Company Ltd. ("Irish Assurance"). Plaintiff and Ball eventually went to Ireland. In Ireland plaintiff introduced Ball to officials of National. Also, it was in Ireland that plaintiff and Ball met with an officer of Industrial. Thus, part of plaintiff's services were performed in Ireland. Plaintiff performed no services of any importance after these meetings in Ireland, but the jury found that the services which he performed up to that time were sufficient to entitle him to compensation. Conse-

quently, it is immaterial that the eventual contract between defendant and Industrial was negotiated by defendant in Florida and ultimately signed in Ireland.

These are the relevant contacts. No New York case decided since *Auten* has been discovered which affords any guide as to how these contacts should be grouped. My task is to divine what a New York court, presented with these facts, would do.

The New York statute and decisions express the policy of New York that in order to provide full compensation for a plaintiff who is entitled to recover the reasonable value of services, interest should be included for the period during which plaintiff was deprived, by defendant's breach, of the use of the money which defendant should have paid him. In my opinion, a New York court would hold that a New York resident, suing in New York, under an agreement made and partially performed in New York, should be compensated in accordance with New York's idea of full compensation. In the light of New York's policy, it would seem irrelevant that part of plaintiff's services were performed in another state or country. Plaintiff is entitled to be fully compensated, regardless of where he performed his services.

In *Auten,* the court emphasized that the merit of the grouping of contacts approach "is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately

concerned with the outcome of [the] particular litigation' . . ." (308 N.Y. at 161). It is difficult to believe that the Republic of Ireland would have any interest in the amount of the damages to be awarded to a New York citizen in a suit in a New York court against an American corporation arising out of a contract between them made in New York. It is hard to see how Ireland is in any way concerned with the outcome of this litigation in which no Irish citizen is involved. Certainly New York is more intimately concerned with it than Ireland. For these reasons I hold that New York law governs the claim for pre-judgment interest in this case.

The question remains as to the date from which interest should be computed. CPLR §5001 provides that:

> "Interest shall be computed from the earliest ascertainable date the cause of action existed. . . ."

What is that earliest ascertainable date in this case?

One necessary element of plaintiff's claim which he was required to establish in order to recover was that a contract was eventually made between defendant and Industrial for the purchase by defendant of National's stock. A contract was in fact made between these parties on May 8, 1958. In form, however, the contract was not a flat commitment by defendant to buy the stock. It was an option to purchase the stock for a sum in pounds equivalent to $1,755,373, an option which could be exercised at any time up to August 8,

1963, a date which was subsequently extended to August 8, 1966. The contract further provided that each year defendant should pay to Industrial £100,000, equivalent to $280,000, and that these payments should be applied first to pay off debts owed by National to Industrial or owed by National to others and guaranteed by Industrial.

These debts totalled $952,823. Payments by defendant in excess of that amount were to be applied to the purchase price of the stock. The contract provided that the sums paid by defendant pursuant to this provision up to $952,823 were to be treated as an unsecured non-interest bearing loan by defendant to National but the contract further provided that in the event that defendant failed to exercise its option to buy the stock, defendant should not be entitled to the repayment by National or Industrial of any part of the moneys theretofore paid by defendant to Industrial.

The contract also provided that defendant should have the right to manage the paper mill. In fact, defendant exercised that right immediately upon the signing of the contract on May 8, 1958 and ever since has managed the mill and has nominated a majority of National's board of directors.

Defendant has made the payments of $280,000 each year. At the time of trial, the total amount paid by defendant to Industrial was $2,240,000.

Defendant argued at the trial that this contract was insufficient to support a finding that a purchase

had actually been made. Plaintiff claimed the contrary, and urged that the jury might properly take into account on this issue not only the terms of the contract itself, but also the acts of the parties under it, down to the date of trial. I adopted plaintiff's contention and charged the jury that it might consider the evidence as to the amounts that defendant had paid pursuant to the contract. Defendant did not except to this part of the charge. The jury by its verdict resolved this issue in plaintiff's favor.

I have no doubt that the verdict was correct on this point. Certainly, by now, defendant has invested such a large sum in this enterprise that it is highly unlikely that it will hereafter decide to abandon the project and forfeit the $2,240,000 which it has already paid against a total obligation of approximately $2,700,000. On the other hand, at the moment of signing the contract on May 8, 1958, defendant was not obligated to pay anything, except the initial payment of $280,000, and theoretically, at least, it could have changed its mind the next day without suffering any loss over and above that down payment. The form of the contract cannot be completely ignored. Presumably there was a business reason for drawing it in that form. Defendant was not committed to buy the stock on May 8, 1958. Therefore, plaintiff's right to compensation cannot be said to have come into existence on that day.

As time went on, however, defendant did become committed, as a practical matter, in the sense that it eventually became too late for defendant to withdraw

from the transaction without suffering an undue penalty. Just when that point of no return was reached is hard to say with precision. Clearly, it was reached sometime between the signing of the contract in May 1958 and the trial in November 1965.

Under these circumstances, it appears that the fair thing to do is to fix the beginning of interest on the date when this action was commenced, *i.e.*, December 2, 1960. By that time defendant had paid to National a total of $840,000 and thus had given a substantial hostage to fortune. Also, by that time, defendant had been operating the mill for over 2½ years and was thoroughly familiar with and involved in the business. It may properly be found, viewing the matter realistically, that by that time defendant was definitely committed, and hence that by that time plaintiff's cause of action accrued.

My conclusion is that plaintiff is entitled to interest at the rate of six per cent on $140,000 from December 2, 1960. The Clerk is directed to compute that sum and to add it to the verdict.

So ordered.

Dated: January 4, 1966

/s/ Edward C. McLean
U.S.D.J.

APPENDIX B

Opinion of Palmieri, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PALMIERI, *J.*

This is an action in *quantum meruit* to recover $175,000 as the reasonable value of the plaintiff's services to defendant in finding and bringing to defendant's attention the corporate opportunity to acquire an Irish corporation. After considerable pre-trial activity, the case is very close to being assigned for trial.

The motion before the Court is brought by the defendant for summary judgment dismissing the action. The basis for the motion is that under the law of the State of New York, which concededly applies, the Statute of Frauds (General Obligations Law Section 5-701(10) formerly Personal Property Law Section 31(10))[1] renders void the transaction which is the basis for the suit.

1. The statute, amended in 1964 by the addition of the language hereinafter [italicized], provides:

Agreements required to be in writing.

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

. . . .

"10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, ex-

(*Continued on next page.*)

Appendix B

In 1961, Judge Metzner of this Court granted plaintiff's motion to strike the defendant's affirmative defense based upon the allegation that plaintiff's claims were barred by the New York Statute of Frauds. *Lee* v. *St. Joe Paper Co.*, 197 F. Supp. 229 (S.D.N.Y. 1961). Notwithstanding this decision, defendant suggests that the 1964 amendment to the New York Statute of Frauds set forth in footnote 1 is declaratory of the former law and that it operates retroactively so as to preclude plaintiff's action which was initiated several years before the amendment.

The relationship between the parties was not based exclusively on oral communications. The papers before the Court indicate that upon a trial the plaintiff may be able to establish that he was working for the defendant's account at its special instance and request; that he expected compensation; and that the defendant was aware of this expectation. A crucial and basic issue of fact is presented as to whether the transaction satisfies the statute's requirement of "some note or memorandum" which the New York cases hold need not be an integrated contract. *Seymour* v. *Warren*,

---

change, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. *'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.* This provision *shall apply to a contract implied in fact or in law to pay reasonable compensation but* shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman."

179 N.Y. 1 (1904); *Crabtree* v. *Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E. 2d 551 (1953); *Transit Advertisers, Inc.* v. *New York, New Haven & Hartford R.R.*, 194 F.2d 907 (2d Cir. 1952). Only upon a full factual exploration at the trial can this issue be resolved. The further question much bruited by the defendant on this motion, as to whether the 1964 Amendment to the New York Statute of Frauds vitiates the transaction, can be appropriately decided only when the basic factual premises are established. The meaning and application of the statute and whether it is declaratory of prior law, retroactive in its application, or has only prospective application following the 1964 Amendment are all prematurely presented by this motion. If an example were needed to demonstrate the problems and difficulties of attempting to apply the New York Statute of Frauds one need only compare *Farmer* v. *Arabian American Oil Co.*, 176 F. Supp. 45 (S.D.N.Y. 1959), *reversed*, 277 F.2d 46 (2d Cir. 1960), with *Perrin* v. *Pearlstein*, 314 F.2d 862, 866 (2d Cir. 1963). Moreover, "summary judgment is particularly inappropriate where 'the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.' *Empire Electronics Co.* v. *United States*, 311 F.2d 175, 180 (2d Cir. 1962); see *Alabama Great So. R.R.* v. *Louisville & Nashville R.R.*, 224 F.2d 1, 5 (5th Cir. 1955); *Subin* v. *Goldsmith*, 224 F.2d 753, 758 (2d Cir. 1955). '"A judge may not, on a motion for summary judgment, draw fact inferences. . . . Such inferences may be

drawn only on a trial.'" *Bragen* v. *Hudson County News Co.*, 278 F.2d 615, 618 (3d Cir. 1960)." *Cross* v. *United States*, 336 F.2d 431, 433 (2d Cir. 1964).

The motion for summary judgment is denied.

IT IS SO ORDERED.

Dated: New York, N.Y.
June 15, 1965

/s/ EDMUND L. PALMIERI
U.S.D.J.

APPENDIX C

Opinion of Metzner, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

METZNER, District Judge.

This is an action in quantum meruit to recover the reasonable value of services alleged to have been furnished by plaintiff in arranging the defendant's acquisition of an interest in or control of a company known as National Board and Paper Mills, Ltd. Plaintiff has moved pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, 28 U.S.C.A. to strike defendant's affirmative defense alleging the statute of frauds, and the affirmative defense alleging that plaintiff has failed to claim that "there are any monies due or owing from defendant to plaintiff."

The parties agree that New York law applies to this cause of action and that normally, under that law, the statute of frauds is not a defense to an action in quantum meruit. Harmon v. Alfred Peats Co., 1926, 243 N.Y. 473, 154 N.E. 314. Defendant, however, would have us make an exception to this rule in those actions brought by a business broker seeking to recover the value of his services. It contends that subdivision 10 of Section 31 of the New York Personal Property Law, McKinney's Consol. Laws, c. 41, prohibits re-

covery for such services unless the statute of fraud provisions are satisfied. The New York courts have rejected this contention and applied the general rule to such transactions. Gibson v. Archer Productions, 1st Dept. 1952, 281 App.Div. 661, 117 N.Y.S.2d 438; Wells v. Dent, 4th Dept. 1957, 4 A.D.2d 307, 164 N.Y.S. 2d 646; Spring v. Moncrieff, 1955, 208 Misc. 671, 144 N.Y.S.2d 664; Black v. Fisher, Sup. 1955, 145 N.Y.S. 2d 142; Brand v. Gromet, 1956, 3 Misc.2d 991, 148 N.Y.S.2d 613; Kuffler v. List, D.C.S.D.N.Y.1956, 144 F.Supp. 776. Defendant's first affirmative defense is therefore insufficient and must be stricken.

Defendant's second affirmative defense, insofar as it rests on plaintiff's failure to plead "monies due or owing from defendant", must also be stricken. The complaint, after detailing the claim in 12 paragraphs, states that the "work, labor and services were of the reasonable value of $175,000." and in the "Wherefore" clause demands judgment against the defendant for that amount. This satisfies the notice pleading contemplated by Rule 8 of the Federal Rules of Civil Procedure. Dioguardi v. Durning, 2 Cir., 1944, 139 F.2d 774, 775.

So ordered.

APPENDIX D

Opinion of Bryan, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

BRYAN, District Judge:

This is an action in quantum meruit to recover the reasonable value of services alleged to have been performed by plaintiff for the defendant in arranging for the acquisition by the defendant of an interest in a paper mill in Waterford, Ireland. Defendant now moves to transfer the action to the United States District Court for the District of Florida pursuant to 28 U.S.C. §1404(a).

Plaintiff is a citizen and resident of New York and commenced the action in the Supreme Court, New York County. Defendant, a Florida corporation, with its principal place of business in Florida, removed the action to this court on the grounds of diversity of citizenship, pursuant to 28 U.S.C. §1441.

Defendant urges that the action should be transferred to Florida for the convenience of parties and witnesses and in the interests of justice. In my view it has failed to establish that it is entitled to such a transfer.

Plaintiff is plainly a bona fide resident of New York and does business here. Defendant is now quali-

fied to do business in this state and has a plant in Rochester, New York, a sales office in New York City, and has maintained for some time a suite of offices for the use of its officers in the St. Regis Hotel in New York. Defendant does business in other states as well.

Plaintiff claims that most of the transactions which form the basis for the action took place in New York and in Ireland. He says that he conferred with officers of the defendant in New York and reached the understanding, upon which the services were performed, here. Defendant, on the other hand, through its president, Ball, claims that the conversations which form the basis of plaintiff's claim took place in Florida and not in New York, and that the claim is governed by Florida law.

Thus, there is direct conflict between the parties on this score. Such a dispute cannot be resolved without going into the merits of the case and a hearing on the merits at this stage of the action would be inappropriate. It appears that at least some relevant conversations took place in New York and others in Florida. It certainly cannot be said on the papers before me that these were entirely Florida transactions and that the case has no connection with this jurisdiction.

Defendant says that its witnesses all reside in Florida and that any records concerning the subject matter of the action are kept in its principal office there. However, with one exception, the witnesses defendant refers to are its own officers or employees. These witnesses are under defendant's control and there should

be no difficulty in producing them at a trial in New York.

Defendant further claims that its president, Ball, who was principally concerned in the transactions with plaintiff, has a heart condition which might interfere with his travel to New York. While Ball seems to have cut down his business activities to some extent because of his condition it has not been established to my satisfaction that he is unable to travel or, indeed, that it will imperil his health to come to New York for trial, if that in itself were a reason for transfer. Ball is still active in business and, since 1957 when he had a heart attack, has traveled widely. Even if he were prevented from coming to New York his deposition could be readily taken.

The only witness for the defendant who is not an officer or employee is a man named Bennett, who defendant claims was present at some conversations in Florida between Ball and the plaintiff. Defendant has not made any clear showing of the significance of this witness's testimony. Nor has it shown that there would be any great difficulty in getting him to fly to New York for a trial.

The defendant's records concerning a case of this nature can scarcely be voluminous and the defendant should have no difficulty in producing them at a trial here. Moreover, it has an office and accommodations for its officers in New York City and is accustomed to do business in New York State.

Plaintiff, on the other hand, as a bona fide resident of New York, plainly had a right to bring the action in this state and acquired jurisdiction over defendant here. He carries on his business here and claims that a substantial part of the transactions occurred here. He was entitled to choose this forum and no imputation of forum shopping can be made against him. It appears that as a small business man, without staff, serious hardship would be imposed upon him were he required to conduct and try this action in Florida.

Defendant has failed to show such balance of convenience in its favor as would override plaintiff's right to choose his own forum and to have the action tried in the district where he resides, where he conducts his business, and where defendant also does business.

Defendant's motion to transfer is in all respects denied.

It is so ordered.

Dated: New York, N. Y.
May 5, 1961

/s/ Frederick V.P. Bryan
U.S.D.J.